

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@or AAct@). At issue is whether Administrative Law Judge Gary Melick properly determined that production-operator Extra Energy, Inc. (AExtra Energy@) was liable for a violation of 30 C.F.R. ' 77.404(a)² by its independent contractor, which resulted in a fatal accident, and that Extra Energy violated 30 C.F.R. ' 50.10³ by failing to report the accident. 18 FMSHRC 1489 (August 1996) (ALJ). The Commission granted Extra Energy's petition for discretionary review of the judge's decision. For the reasons that follow, we affirm the judge's determinations.

I.

Factual and Procedural Background

Extra Energy operates the Eckman-Page Strip and Auger Mine, a surface coal mine in McDowell County, West Virginia. 18 FMSHRC at 1489. Melvin Brian Day, Jr. (ABrian@), a security guard with Neal and Associates, Inc. (ANeal@), was assigned to provide security at the mine from 6:00 p.m. to 6:00 a.m. on Friday, Saturday and Sunday nights. *Id.*

On Sunday, April 9, 1995, Brian failed to come home from work at his usual time. *Id.* His father, Melvin Day (AMelvin@), and brother, Jeffrey Shawn Day (AShawn@), went to the mine looking for Brian. *Id.* at 1489-90. They found Brian's car on a hill near the stockpiles. Tr. 72. The car was running, the windows were rolled up, and the doors were locked. 18 FMSHRC at 1490. Brian was seated in the car in a semi-reclined position. *Id.*; Tr. 57. Melvin and Shawn gained access to the car by breaking the sunroof. 18 FMSHRC at 1490. After trying unsuccessfully to call for help by CB radio, they took Brian's body to a market in a nearby town where they called an ambulance. *Id.*

After the ambulance arrived, Melvin and Shawn were informed that nothing could be done with Brian's body until the police arrived. Tr. 36. The police arrived, released Brian's body to the ambulance crew, and traveled to the accident site with Melvin and Shawn. 18 FMSHRC at 1490. The police examined the car, started the engine and took photographs. Tr. 58. When the engine

² Section 77.404(a) provides:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

30 C.F.R. ' 77.404(a).

³ Section 50.10 provides in part that A[i]f an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine.@ 30 C.F.R. ' 50.10.

was started, one of the policemen commented on the odor of the fumes released by the car. Tr. 59. After their examination, the police allowed Shawn to drive the car off mine property. 18 FMSHRC at 1490.

Later that day, James Altizer, Brian's supervisor at Neal, received a telephone call that Brian had died at the mine site. *Id.* Altizer traveled to the mine, picking up another security guard who had a key to the mine, along the way. Tr. 124. When they arrived at the gate, they observed that it was already open. 18 FMSHRC at 1490. After they were unable to find anyone on the premises, they left for the police station. Tr. 125. On the way, they met Judy Neal and Harlis Mitchell, the vice-president and general manager, respectively, of Neal, who confirmed that an accident had occurred. Tr. 126; E. Post-Hr=g Br. at 6. The four then traveled to a local market to make telephone calls. Tr. 127, 131.

At around 4:00 or 5:00 p.m. that day, Altizer called Extra Energy Superintendent Steve Haynes to inform him of Brian's death. 18 FMSHRC at 1490; Tr. 133-35. Altizer testified that he told Haynes that it appeared, from information he had received, that one of their security guards had died of carbon monoxide poisoning at the job site. Tr. 134, 153-54. According to Altizer, Haynes responded that ~~he~~ would take it from there. 18 FMSHRC at 1490. Altizer also informed Haynes that a car window had been broken to remove Brian from the car and that the police had investigated the site. Tr. 153-54, 299.

The next morning on April 10, at approximately 5:30 a.m., Haynes visited the mine to look for broken glass in order to determine where Brian had been found. Tr. 299-300. Haynes was unable to find any glass. Tr. 300.

At approximately 9:00 a.m., while at another mine site, Haynes was contacted by an inspector with the West Virginia Department of Mines, Eddie Miller. Tr. 174, 302-03. Haynes testified that Miller asked him questions about the incident and that Haynes replied that he had just returned from the site and that he had been unable to find any broken glass. Tr. 303. He stated that Miller had replied that they did not know anything either and that he had heard that they had found Brian at the local market, in a nearby town, or near the load-out at the foot of a hill at the mine. Tr. 303.

Later that morning, Haynes called the offices of Neal on two occasions seeking to speak with Judy Neal, who was not present at either time. Tr. 301. The second time he called, Haynes spoke with Neal General Manager Mitchum who offered no further information on the location of the accident. Tr. 301; E. Br. at 22. In addition, someone from Extra Energy's office contacted the police about the incident, but the police refused to release any information. Tr. 303.

At approximately 1:00 p.m. that day, Haynes was contacted by an inspector with the Department of Labor's Mine Safety and Health Administration (MSHA), David Radcliff. Tr. 172-73, 300. Inspector Radcliff had been informed about the accident that day by Randolph Richardson, who had provided safety training to security guards employed by Neal. Tr. 230.

Haynes was unable to provide Inspector Radcliff with any information. Tr. 301.

At approximately 7:00 p.m. that evening, while driving home, Haynes saw Altizer and Mitchum speaking, their cars parked beside the road. Tr. 305. Haynes joined them and asked whether they knew where Brian had been found. Tr. 305. They replied that they did not. Tr. 305.

On April 11, Inspector Radcliff assigned the accident investigation to William Uhl, an investigator with MSHA. 18 FMSHRC at 1490; Tr. 172-73. Inspector Uhl first contacted the West Virginia Department of Mines and spoke with Miller. 18 FMSHRC at 1490; Tr. 174. Miller informed him of the approximate location where Brian had been found, and that the coroner's report indicated that Brian had died from carbon monoxide poisoning. *Id.*

Later that day, Inspector Uhl contacted Haynes at the mine. Tr. 306. Haynes testified that they traveled the county road adjacent to the mine and examined the gates and that he had shown Inspector Uhl what he had done the preceding day. Tr. 306. Haynes testified that there was still no indication of where Brian's car had been found. Tr. 306.

During the course of his investigation, Inspector Uhl determined that Brian's car had a damaged exhaust system and rusted-out areas that had allowed carbon monoxide to enter the driver's compartment. Tr. 217. He stated that the exhaust leaks were audible, and that there was an odor to the exhaust fumes. Tr. 204, 206. Inspector Uhl stated that a carbon monoxide detector detected 900 parts per million (ppm) of carbon monoxide in the driver's compartment after the car's motor had run for 15 minutes. 18 FMSHRC at 1491. He stated that 500 ppm of carbon monoxide can cause a fatality over a three-hour period of time. Tr. 207. The car was also missing a valid state inspection sticker. 18 FMSHRC at 1496.

Inspector Uhl issued a citation to Extra Energy alleging a significant and substantial violation of section 77.404(a). Gov't Ex. 20. He designated the level of negligence as low because Brian's car was operated only during non-production hours and was rarely seen by Extra Energy. 18 FMSHRC at 1491. In addition, he issued a citation to Extra Energy alleging a violation of section 50.10. *Id.* at 1493; Gov't Ex. 21. Finally, Inspector Uhl issued two citations to Neal alleging violations of the same standards. Tr. 238; E. Post-Hr'g Br. at 7. The inspector designated a higher level of negligence in the citations issued to Neal. E. Post-Hr'g Br. at 7. Neal did not contest the citations. Tr. 238.

Extra Energy challenged the citations, arguing that it was not properly cited for the violation of section 77.404(a) committed by Neal, and that it did not violate section 50.10. 18 FMSHRC at 1493-96. The matter proceeded to hearing before Judge Melick.

The judge concluded that Extra Energy violated sections 77.404(a) and 50.10. *Id.* at 1496. First, he rejected Extra Energy's argument that the Secretary abused her discretion in citing Extra Energy for violating section 77.404(a). *Id.* at 1495-96. Although he found that MSHA's

Enforcement Policy and Guidelines for Independent Contractors, set forth in its *Program Policy Manual* (Vol. III, Part 45) (Guidelines) were either meaningless or had not been satisfied, the judge concluded that there were sufficient grounds for citing Extra Energy because it had contracted with Neal for security, and the car had an obviously defective exhaust system and no current inspection sticker. *Id.* In addition, the judge rejected the operator's argument that Brian was a trespasser and not a miner within the meaning of section 3(g) of the Mine Act, 30 U.S.C. § 802(g), and that it, therefore, was not responsible for his actions. *Id.* at 1494. He also found Extra Energy strictly liable for the reporting violation because a fatal accident had occurred at the mine and Extra Energy had failed to report it to MSHA. *Id.* at 1496. In addition, the judge credited Altizer's testimony that he had informed Haynes that Brian had died of carbon monoxide poisoning at the mine. *Id.* However, the judge concluded that negligence for both violations was low due to mitigating circumstances. *Id.* Accordingly, the judge affirmed both citations and assessed civil penalties of \$500 and \$50 for the violations of sections 77.404(a) and 50.10, respectively. *Id.* at 1497.

The Commission subsequently granted Extra Energy's petition for review of the judge's decision and heard oral argument.

II.

Disposition

A. Equipment Violation

1. Whether the Secretary Abused Her Discretion by Citing Extra Energy

Extra Energy argues that the judge erred in finding it liable for violating section 77.404(a) after he concluded that the Guidelines were either meaningless or had not been satisfied. E. Br. at 6-14. It asserts that the Commission has, in effect, adopted the Secretary's Guidelines, and that none of the criteria had been satisfied. *Id.* at 11-13. The Secretary responds that she has unreviewable discretion to cite production-operators, independent contractors, or both. S. Br. at 10-19. She submits that, even if her decision to cite Extra Energy were reviewable, her decision was within the wide discretion recognized by the Commission. *Id.* at 19-21.

The Commission and various courts have long recognized that, under the Mine Act's scheme of strict liability, an operator, although faultless itself, may be held liable for the acts of its independent contractor. *Bulk Transp. Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981). In instances of multiple operators, the Secretary has wide enforcement discretion and may proceed against an operator, independent contractor, or both. *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (February 1997), *aff'd per curiam*, No. 97-1392 (4th Cir. January 8, 1998); *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989). The Commission has determined that its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion. *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994). A litigant seeking to establish

an abuse of discretion bears the heavy burden of establishing that there is no evidence to support the Secretary's decision or that the decision is based on an improper understanding of the law. *Mingo Logan*, 19 FMSHRC at 249-50 n.5.

The Commission has considered various factors in determining whether an enforcement action constitutes an abuse of the Secretary's discretion, including the operator's day-to-day involvement in the mine's operations (*Mingo Logan*, 19 FMSHRC at 250; *W-P*, 16 FMSHRC at 1411), whether the operator is in the best position to affect safety (*Bulk*, 13 FMSHRC at 1361) and whether the enforcement action is consistent with the purpose and policies of the Act (*Old Ben Coal Co.*, 1 FMSHRC 1480, 1485 (October 1979)). In addition, the Commission has considered whether any of the criteria of the Secretary's Guidelines for proceeding against an operator have been satisfied. *See, e.g., Bulk*, 13 FMSHRC at 1360; *Mingo Logan*, 19 FMSHRC at 250. While failure to satisfy the criteria is not fatal to an enforcement decision (*Mingo Logan*, 19 FMSHRC at 250), the Commission has relied upon satisfaction of the criteria in concluding that there was no abuse (*e.g., Bulk*, 13 FMSHRC at 1360).⁴

Here, Extra Energy had substantial involvement in the day-to-day operations at the mine. As the production-operator responsible for day-to-day mining activities, Extra Energy contracted with Neal for security services. Tr. 289-91. In obtaining Neal's services, Haynes had described the guard's duties and the areas to be patrolled. Tr. 289-91. Extra Energy also retained some supervision over the security guards in that it was responsible for reviewing reports submitted by the guards describing the area patrolled and whether the area had been secure. Tr. 316-17, 333-34; Gov't Ex. 1.

In addition, contrary to Extra Energy's assertions, there is evidence in the record satisfying the first two criteria of the Secretary's Guidelines.⁵ Extra Energy did not provide the guards with a structure to protect them from the elements during their shift, leaving the guards' vehicles as the only available shelter. Tr. 121, 322. Despite the guards' dependence upon their cars, Extra Energy took no measures to ensure that the cars were safe, either by inspecting them itself or by requiring that Neal did so. Tr. 240, 265, 267. As a result, the obvious defects in Brian's car were not discovered. Through its failure to inspect or ensure that the security guards' vehicles were inspected, Extra Energy contributed to the equipment violation and to the continued existence of the violation.

⁴ The Commission has repeatedly recognized that the Guidelines are policy statements and are not binding on the Secretary. *Mingo Logan*, 19 FMSHRC at 250; *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (September 1996), *appeal docketed*, No. 96-70877 (9th Cir. Oct. 21, 1996).

⁵ We find improperly speculative the judge's conclusion that the first two criteria are unworkable and essentially meaningless because it can always be said that a production operator contributed by omission to a violation on its premises by one of its contractors. @ 18 FMSHRC at 1495.

Given Extra Energy's involvement in the mine's day-to-day affairs, and its complete failure to inspect or ensure that the vehicles were inspected, we conclude that Extra Energy has failed to prove that there is no evidence to support the [Secretary's] decision to proceed against it. *Mingo Logan*, 19 FMSHRC at 249-50 n.5. Accordingly, we affirm the judge's conclusion that the Secretary did not abuse her discretion in citing Extra Energy for violating section 77.404(a).⁶

⁶ In light of our conclusion, as in *Mingo Logan*, 19 FMSHRC at 251 n.7, we do not reach the Secretary's argument that she has unreviewable discretion to cite the operator, independent-contractor or both.

2. Whether Brian was a Miner Rather than a Trespasser

Extra Energy argues that substantial evidence⁷ does not support the judge's finding that Brian was a miner within the meaning of section 3(g) of the Act,⁸ rather than a trespasser. E. Br. at 15-18. Extra Energy relies upon Haynes' testimony that he had instructed Altizer and Brian that Neal's guards were to remain outside the mine gates and to conduct their patrols along the adjacent county road. *Id.* at 15-16. It asserts that the judge failed to consider Altizer's testimony that Brian's duties had changed so that he was no longer required to patrol the auger on mine property, and the testimony of Donald Graham, an employee of Extra Energy, that unbroken tracks on the access road to the auger indicated that the auger had not been patrolled. *Id.* at 16-17. The Secretary responds that the judge properly determined that Brian was a miner. S. Br. at 22-25.

In reaching his determination that Brian was a miner, the judge discredited Haynes' testimony that he had instructed Brian that he was not allowed on mine property. 18 FMSHRC at 1494. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (September 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (December 1981).

As the judge found, Haynes' testimony that Brian was not authorized to be on mine property is contradicted by evidence that Brian had been given a key to the mine property in case of emergencies. Tr. 318-19. Haynes admitted that Brian would need the key to remove trespassers from the property. Tr. 337. Haynes also acknowledged that the gates were probably on mine property and that it was part of Brian's duties to ensure that the gates were locked. Tr.

⁷ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C.

' 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁸ Section 3(g) of the Mine Act defines a miner as "any individual working in a . . . mine." 30 U.S.C. ' 802(g).

338-40. Haynes conceded that he did not request that Brian return the key, even after he had discovered Brian on mine property on two occasions. Tr. 321.

In addition, Haynes' testimony that Brian was a trespasser is not supported by the reports that Brian submitted detailing the areas he had patrolled and whether they were secure. Tr. 316; Gov't Ex. 1. The reports were reviewed by an employee at another Extra Energy site, who forwarded them to Haynes, if there were any problems.⁹ Tr. 316-17, 333-34. The reports indicated that Brian had been patrolling the stockpiles and auger on the mine property on a daily basis. Tr. 316.

Furthermore, the testimony of Graham and Altizer relied upon by Extra Energy does not necessarily establish that Brian was not allowed on mine property. Altizer did not testify that Brian was not authorized to patrol the auger. Rather, Altizer testified that Brian had stated that his duties had changed in that Brian was supposed to check the auger and, rather than staying there, he could move to a different location, such as the hill between two stockpiles, where he had better CB communications. Tr. 107, 147, 157-58. Moreover, evidence that Brian did not travel the access road to the auger does foreclose the possibility that Brian ensured the security of the auger by another means while on mine property, such as by watching the entrance to the auger access road. *See* Tr. 335.

We do not find the extraordinary circumstances requiring that we overturn the judge's credibility determination. Accordingly, we conclude that the judge's determination that Brian was a miner within the meaning of the Act is supported by substantial evidence. Because Extra

⁹ Although Haynes testified that he had never reviewed the reports prior to the accident, he admitted that it was his responsibility to review the reports if there were problems. Tr. 316-17.

Energy did not contest any other basis for the equipment violation,¹⁰ we affirm the judge's finding that Extra Energy violated section 77.404(a).¹¹

B. Reporting Violation

Extra Energy argues that the judge's finding of a reporting violation was erroneous as a matter of law and was not supported by substantial evidence. E. Br. at 18-24. It submits that Extra Energy's duty to contact MSHA did not arise until it was aware that a reportable accident had occurred, and that it did not have a reasonable opportunity to ascertain whether the accident had occurred on mine property. *Id.* at 18-21. Extra Energy maintains that, in any event, Haynes' investigative actions upon being informed of the accident were reasonable. *Id.* at 21-25. The Secretary responds that substantial evidence supports the judge's determination that Extra Energy violated section 50.10. S. Br. at 26-27.

Section 50.10 requires operators to report immediately to MSHA the occurrence of certain accidents, as defined in section 50.2(h). In relevant part, section 50.2(h) includes within

¹⁰ In its petition for discretionary review, Extra Energy contested the violation on the basis that Brian's car was not equipment, but did not address the argument in its brief. PDR at 8-9. The Commission need not address this argument because Extra Energy has abandoned it. *RNS Servs., Inc.*, 18 FMSHRC 523, 526 n.6 (April 1996). We also note that the question was raised for the first time in Extra Energy's petition, and that the judge was not afforded an opportunity to pass upon it. 18 FMSHRC at 1496; 30 U.S.C. ' 823(d)(2)(A)(iii).

¹¹ Given our conclusion, we need not reach the Secretary's arguments that, even if Brian had been outside the gates, he would still be on mine property because a mine includes private ways and roads appurtenant thereto, (S. Br. at 24-25) and that because the Mine Act is a strict liability statute, an operator is strictly liable for violations that take place at its mine even if it was the victim of an unrelated party's actions (*Id.* at 25, citing *Secretary of Labor v. Miller Mining Co.*, 713 F.2d 487 (9th Cir. 1983)).

the definition of "accident," the death of an individual at a mine. 30 C.F.R.

50.2(h)(1). Because section 50.10 contemplates that operators must first determine whether particular events constitute reportable accidents within the meaning of section 50.2(h), section 50.10 necessarily accords operators a reasonable opportunity for investigation into an event prior to reporting to MSHA. *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (October 1989). Such an internal investigation . . . must be carried out by operators in good faith without delay and in light of the regulation's command of prompt, vigorous action. *Id.*

The judge failed to analyze the alleged violation against this framework. Rather, the judge affirmed the citation based on his finding that Altizer had informed Haynes that Brian had died of carbon monoxide poisoning at the mine, and on his conclusion that Extra Energy was strictly liable for the violation based on undisputed evidence that an accident had occurred on mine property and Extra Energy had failed to report it. 18 FMSHRC at 1496. Nonetheless, we find substantial evidence in the record to support his holding that Extra Energy violated section 50.10.

In applying the Commission's test, reasonable minds may reach different conclusions as to whether Haynes's actions in waiting until the morning of April 10 to begin an investigation by visiting the mine to look for broken glass amounted to reasonable investigative efforts. Evidence of Haynes's actions after his initial visit to the mine, however, supports only the conclusion that Haynes failed to investigate and report the accident as required by section 50.10.

On the morning of April 10, after he failed to find broken glass at the mine site, Haynes did not vigorously continue his investigative efforts until he discovered the circumstances of Brian's death. Rather, he returned to his work duties, traveling to another mine site. Tr. 300, 302-03. Although he called Neal's offices, when Mitchum informed him that he knew nothing more about the accident than did Haynes, Haynes did not further pursue the basis for Altizer's statement that Brian had died at the mine site. Tr. 301. His next significant contact with Neal personnel occurred only by happenstance, when Haynes noticed Altizer and Mitchum talking on the side of the road that Haynes traveled on his way home. Tr. 305. Haynes did not contact the sheriff's office either in person or by telephone even after the sheriff's office refused to release information to the Extra Energy employee who had placed the call. Tr. 331-32. Haynes did not attempt to reach Brian's family or the hospital to find out more information about the accident.¹² Tr. 304, 331. In addition, even if the involvement of state and local police led Haynes to believe that the incident had occurred off mine property, as argued by Extra Energy, Haynes should been alerted that it was appropriate to contact MSHA after he discovered that state mine inspectors were investigating the accident on the morning of April 10. Tr. 174, 302-03.

Such actions do not demonstrate an investigation carried out in good faith without delay

¹² As noted by Extra Energy, Haynes could not have called Brian's family because they did not have a telephone. E. Br. at 23; Tr. 62. However, Haynes did not attempt to reach Brian's family in person or by CB radio.

and in light of the regulation's command of prompt, vigorous action. @ *Consolidation*, 11 FMSHRC at 1938. Because the evidence of Haynes' actions after his initial inspection on April 10 supports only the conclusion of violation, remand for reconsideration of the issue by the judge is unnecessary. See *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (September 1993) (remand unnecessary where reconsideration of issue by judge would serve no purpose). Accordingly, we affirm in result the judge's determination that Extra Energy violated section 50.10.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that Extra Energy violated sections 77.404(a) and 50.10.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Commissioner Verheggen, concurring in part and dissenting in part:

I agree with and join in my colleagues' decision except Sections II.A.1 at n.5 and II.B. I agree with my colleagues' conclusion that the judge properly found that the Secretary did not abuse her discretion in citing Extra Energy. @ Slip op. at 6. Although my colleagues state that they do not reach the Secretary's argument that she has unreviewable discretion to cite the operator, independent-contractor or both @ (*id.* at 6 n.5), in effect they *do* reach the issue and reject the Secretary's argument by reviewing her exercise of discretion in this case. In one breath, my colleagues say that the Secretary did not abuse her discretion @ here, and even cite a Commission case that unequivocally holds that Commission review of the Secretary's action in citing an operator is appropriate to guard against an abuse of discretion. @ Slip op. at 5 (citing *W-*

P Coal Co., 16 FMSHRC 1407, 1411 (July 1994)). In the very next breath, my colleagues claim that they need not address the Secretary's assertion that her discretion is unreviewable. Slip op. at 6 n.5. The note my colleagues drop from their holding and the holding itself contradict each other. I therefore write separately on this issue to disassociate myself from the note.

Furthermore, I disagree with the Secretary's contention that she has virtually unreviewable discretion in multiple operator situations to decide which operator to cite for a violation of the Act. S. Br. at 17.¹ I stand by the Commission's prior pronouncements on this subject, and would reaffirm at every opportunity the principle that a review of the Secretary's action in citing an operator is appropriate to guard against an abuse of discretion. *W-P Coal Co.*, 16 FMSHRC at 1411. I believe it is vital for the Commission to faithfully discharge its duty to develop a uniform and comprehensive interpretation of the Mine Act. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994) (citing *Nomination Hearing Before the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 1 (1978)). Congress explicitly charged the Commission with the responsibility . . . for reviewing the enforcement activities of the Secretary . . . [to] provide guidance to the Secretary in enforcing the [Mine Act]. *Nomination Hearing, supra*, at 1. Such review is paramount to guard against mischief or worse in the Secretary's exercise of her prosecutorial discretion. *Cf. Minerals Exploration Co.*, 8 FMSHRC 477, 486-87 (April 1986).

I also dissent from Section II.B of my colleagues' decision affirming in result the judge's conclusion that Extra Energy violated section 50.10. I agree with my colleagues that the judge failed to analyze the alleged violation against the framework established by the Commission in *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (October 1989), which affords operators a reasonable opportunity for investigation into an event prior to reporting to MSHA. I disagree, however, with my colleagues' conclusion that the record evidence supports *only* the finding of a violation, thus obviating the need for remand. Slip op. at 9. I believe there is conflicting evidence as to whether Extra Energy violated section 50.10, the resolution of which should be made by the judge because the ALJ has sole power to . . . resolve inconsistencies in the evidence. *Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132, at *3 (4th Cir. Dec. 30, 1997) (quoting *Grizzle v. Picklands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993)).

¹ The Secretary herself admits that the Commission has the authority to review her enforcement discretion to guard against invidious and unconstitutional discrimination. S. Br. at 13 n.6.

The Commission held in *Consolidation Coal Co.* that A[t]he immediateness of an operator's notification under section 50.10 must be evaluated on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting.@ 11 FMSHRC at 1938. In this case, such Arelevant variables@include the fact that Extra Energy Superintendent Haynes was unable to determine whether the accident had occurred on mine property because the vehicle had been removed and he was unable to find any broken glass (Tr. 299-300); that Neal and Associates, the victim's employer, was unable to provide Haynes with any definitive information as to where the accident occurred (Tr. 301); that the victim's family could not be reached by telephone (Tr. 62-63); and that the state police, who first investigated the accident, would not release any information (Tr. 303).² These facts, in addition to those raised by my colleagues, should be evaluated by the judge in order to determine whether Haynes= investigation was in fact carried out Ain good faith and without delay.@ 11 FMSHRC at 1938. Accordingly, I would vacate the judge's decision on this issue and remand for further proceedings.

Theodore F. Verheggen, Commissioner

Distribution

² Indeed, the very involvement of the state and local police, which according to MSHA do not have jurisdiction over accidents occurring on mine property (Tr. 246-47), suggests that Haynes= belief that the accident did not occur at the mine may have been reasonable.

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